



INTERIOR BOARD OF INDIAN APPEALS

Tohatchi Special Education and Training Center, Inc. v. Navajo Area Director,
Bureau of Indian Affairs

26 IBIA 138 (07/25/1994)

Related Board case:
25 IBIA 259



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

TOHATCHI SPECIAL EDUCATION AND TRAINING CENTER, INC.

v.

NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-107-F
(IBIA 93-51-A)

Decided July 25, 1994

Application for attorney fees and expenses under the Equal Access to Justice Act.

Denied.

1. Attorney Fees: Equal Access to Justice Act: Generally--Contracts:
Indian Self-Determination and Education Assistance Act:
Generally: Indians: Indian Self-Determination and Education
Assistance Act: Generally

Under 25 U.S.C. § 450m-1(c) (1988), the Equal Access to Justice Act applies to administrative appeals filed by tribal organizations regarding contracts under the Indian Self-Determination Act.

2. Attorney Fees: Equal Access to Justice Act: Generally

Under the Department's regulations implementing the Equal Access to Justice Act, an application for attorney fees and expenses must demonstrate that the applicant meets the definition of "party" in 5 U.S.C. § 504(b) (1) (B) (1988).

3. Attorney Fees: Equal Access to Justice Act: Generally

Under 43 CFR 4.608(f), an application for attorney fees and expenses under the Equal Access to Justice Act must be signed by the applicant or an authorized officer of the applicant.

APPEARANCES: Raymond Z. Ortiz, Esq., Santa Fe, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Tohatchi Special Education and Training Center, Inc., has applied for attorney fees and expenses under the Equal Access to Justice

Act (EAJA), 5 U.S.C. § 504 (1988). ^{1/} For the reasons discussed below, the Board denies the application.

Background

The underlying proceeding in this matter concerned a challenge to a decision issued by the Navajo Area Contracting Officer on October 21, 1992, and concurred in by the Navajo Area Director on November 6, 1992. The decision denied mature contract status to appellant's Indian self-Determination Act contract. On April 7, 1994, the Board vacated the challenged decision and remanded the matter to the Area Director for further proceedings. Tohatchi Special Education and Training Center, Inc. v. Navajo Area Director, 25 IBIA 259 (1994).

Appellant filed a timely application for attorney fees and expenses. The Area Director did not file an answer.

Discussion and Conclusions

[1] 25 U.S.C. § 450m-l(c) provides that EAJA "shall apply to administrative appeals pending or filed after October 5, 1988, by tribal organizations regarding self-determination contracts." Accordingly, if appellant's application is in order, it may be considered under EAJA.

As the parties were advised in the Board's decision on the merits, 25 IBIA at 267 n.13, appellant's application was to be submitted pursuant to the regulations in 43 CFR 4.601-4.619, which govern the implementation of EAJA in Departmental proceedings. ^{2/}

^{1/} All further citations to the United States Code are to the 1988 edition or supplements thereto.

^{2/} Technically, these regulations are applicable only to proceedings which were pending before the Department between Oct. 1, 1981, and Sept. 30, 1984. 43 CFR 4.604. However, they are the only Departmental guidance concerning payment of attorney fees under EAJA, and the Board has no regulations of its own on this subject. Therefore, the Board advised appellant to submit its application in accordance with the Departmental regulations. Cf. proposed 25 CFR 900.804(b), in the Department's proposed regulations for implementation of the 1988 Indian Self-Determination Act Amendments, 59 FR 3166, 3206 (Jan. 20, 1994): "The EAJA claims for [the Department of the Interior] will be handled under regulations at 43 CFR part 4, subpart F, §§ 4.601-4.619."

The Department's regulations require that an application be filed within 30 days after final disposition of the underlying proceeding. CFR.4.611. They also permit the filing of an answer by the Department. 43 CFR 4.613. Although 43 CFR 4.615(b) permits further proceedings if they found to be necessary, that section also provides: "Ordinarily, the determination of an award will be made on the basis of the written record of the underlying proceeding and the filings required or permitted by the foregoing sections of these rules."

43 CFR 4.608 sets out the required contents of an application for attorney fees and expenses under EAJA. Among other things, the provisions of section 4.608 require that an applicant demonstrate it is a "party" entitled to seek attorney fees and expenses under EAJA.

5 U.S.C. § 504(b)(1)(B) provides that, for purposes of EAJA,

"party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j (a)), may be a party regardless of the net worth of such organization or cooperative association.

43 CFR 4.608 provides in part:

(b) The application shall include a statement that the applicant's net worth at the time the proceeding was initiated did not exceed \$1 million if the applicant is an individual (other than a sole owner of an unincorporated business seeking an award in that capacity) or \$5 million in the case of all other applicants. [3/] An applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) and is exempt from taxation under section 501(a) of the code or in the case of an organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under section 501(c)(3) of the Code; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) If the applicant is a partnership, corporation, association, or public or private organization (including charitable or other tax exempt organizations or cooperative associations) or a sole owner of an unincorporated business, the application shall state that it did not have more than 500 employees at the time the

^{3/} These monetary limits were raised in the 1985 amendments to EAJA, Act of Aug. 5, 1985, 99 Stat. 183, § 1(c)(1). See 5 U.S.C. § 504(b)(1)(B), quoted supra.

proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its organization and business.

43 CFR 4.609(a) provides that an applicant "except a qualified tax-exempt organization or a qualified cooperative association must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated."

Appellant's application states:

Tohatchi was a "party" to those proceedings eligible to apply for an award of fees and expenses within the meaning of 5 U.S.C. § 504(b)(1)(B)(ii) in that Tohatchi is an organization described in Section 501(c)(3) of the Internal Revenue Code and exempt from taxation under Section 501(a) of such code which may be a party regardless of the net worth of such organization. At the time these proceedings were initiated, Tohatchi was an organization described in Section 501(c)(3) of the Internal Revenue Code and exempt from taxation under Section 501(a) of the Code.

In the alternative, Tohatchi was a party to these proceedings within the meaning of 5 U.S.C. § 504(b)(1)(B)(ii) in that Tohatchi is a corporation the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated and which had not more than 500 employees at the time the adversary adjudication was initiated. At the time the proceedings were initiated, Tohatchi had a net worth which did not exceed \$7,000,000 and had less than 500 employees.

(Appellant's Application at 3-4).

[2] Appellant's first assertion is that it is a qualified tax-exempt organization. Appellant does not, as required by 43 CFR 4.608(b)(1), include in its application either a ruling by the Internal Revenue Service concerning its tax-exempt status or a statement describing the basis for its belief that it qualifies as a tax-exempt organization under 26 U.S.C. § 501(c)(3). Accordingly, appellant has failed to demonstrate that it meets the definition of "party" as a qualified tax-exempt organization. ^{4/}

Appellant's alternative assertion is that its net worth does not exceed \$7,000,000 and that it has less than 500 employees. Appellant does not attach a net worth exhibit, as required by 43 CFR 4.609. This requirement applies to all applicants other than those which show that they are qualified tax-exempt organizations or qualified cooperative associations.

^{4/} The Board does not hold that appellant is not a tax-exempt organization under 26 U.S.C. § 501(c)(3), but only that it failed to make the showing required by 43 CFR 4.608(b)(1). Cf. Shoshone-Bannock Tribes v. Hodel, 12 Indian L. Rep. 3101, 3106 and n.8 (D.D.C. 1985), noting a distinction between a tribal school board which was qualified under 26 U.S.C. § 501(c)(3) and another in which there was no showing of such qualification.

Appellant's application also fails to include the statement required by 43 CFR 4.608 concerning the actual number of its employees and the type and purpose of its organization. This requirement applies to all organizations, including tax-exempt organizations.

The Board concludes that appellant has failed to demonstrate, in accordance with the requirements of 43 CFR 4.608 and 4.609, that it qualifies as a "party" under EAJA.

[3] Appellant's application fails to comply in at least one other respect with the requirements of 43 CFR 4.608. Section 4.608(f) provides: "The application shall be signed by the applicant or an authorized officer of the applicant." Appellant's application is not signed by one of its officers, but by its attorney.

The Board recognizes that its own regulations allow a notice of appeal, as well as other appeal filings, to be signed by an appellant's attorney, 43 CFR 4.332(a), and that attorneys are normally entitled to represent parties in Departmental proceedings. 43 CFR Part 1. However, by specifically designating the individuals who must sign an EAJA application, and by omitting attorneys from the designation, the Department's EAJA regulations appear to have announced a different rule for EAJA applications. Further, the omission of attorneys from the designation appears to have been deliberate. Although the Department generally followed the model EAJA rules published by the Administrative Conference of the United States, see 48 FR 17595 (Apr. 25, 1983), it deleted the phrase "or attorney," found in the model version of this section, 5/ strongly suggesting an intent to exclude attorneys from the categories of authorized signers.

The Board concludes that an EAJA application signed only by the applicant's attorney fails to meet the requirement of 43 CFR 4.608(f).

Appellant's application failed to comply with the requirements of 43 CFR 4.608 and 4.609 in several respects. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's application for attorney fees and expenses is denied.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

5/ See Model Rules at sec. 0.201, 46 FR 32900, 32913 (June 25, 1981): "The application shall be signed by the applicant or an authorized officer or attorney of the applicant" (Emphasis added).